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JAMES R. BR... Clerk

Supreme Court of the United States

October Term, 1958

No. 601

ANDREW OROZ,

Petitioner,

against

AMERICAN PRESIDENT LINES, LTD.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1958

No.

ANDREW OROZ, *Petitioner,*

against

AMERICAN PRESIDENT LINES, LTD., *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled matter on September 30, 1958.

Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of New York, Honorable LAWRENCE E. WALSH, in favor of respondent is reported at 154 F. Supp. 241, and is set out in the appendix to this petition at pages 25-29.

The opinion of the United States Court of Appeals for the Second Circuit, reported at 259 F. 2d 636, is set out in the appendix to this petition at pages 17-24.

Jurisdiction

This action, arising out of a maritime tort, and within the Admiralty and Maritime jurisdiction, was brought in the United States District Court for the Southern District of New York on the law side of the Court, predicated upon diversity of citizenship and jurisdictional amount.

The District Court, on motion, dismissed the complaint and entered judgment thereon.

Petitioner appealed from said dismissal to the United States Court of Appeals for the Second Circuit, which Court affirmed the ruling of the lower Court on September 30, 1958.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. In an action for money damages arising out of personal injuries suffered as a result of a maritime tort and within the Admiralty and Maritime jurisdiction, may the Court arbitrarily and mechanically apply a state procedural statute, specifically enacted for suits in the state courts arising under the common-law jurisdiction of the state, to the Admiralty jurisdictional setting thus destroying the paramount federal power in favor of the state procedural form?

2. Is the statutory language, "wrongful act", neglect or default. In a State Statute of Limitations encompass an an action for personal injuries grounded upon the General Maritime Law doctrine of seaworthiness?

3. In an action within the Admiralty and Maritime jurisdiction wherein the equitable doctrine of laches is applicable, may a District Court destroy a cause by trial by affidavit, resulting from a declaration of the existence of a presumption of prejudice by inexcusable delay, with the mere passage of the forum State Statute of Limitations?

Statutes Involved

Petitioner sued in the United States District Court for the Southern District of New York to recover money damages for personal injuries sustained as a result of a maritime tort.

Though no state Statute of Limitations can be mechanically applied to bar a cause of action predicated upon the general maritime law doctrine of seaworthiness, the statute of the forum, New York State, reads as follows:

New York Civil Practice Act:

§ 48. *Actions to be commenced within six years.*

* * *

3. An action to recover damages for a personal injury, except in a case where a different period is expressly prescribed in this article.[1]

Respondent asserted the applicability of further statutes, which applicabiltiy petitioner denies, but which read as follows:

New York Civil Practice Act:

§ 13. *Limitation where cause of action arises outside of the state.*

Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action * * *.

---

[1] The "different period" applies only to actions in negligence. New York Civil Practice Act, § 49. *Actions to be commenced within three years.* The following actions must be commenced within three years after the cause of action has accrued:

* * *

6. An action to recover damages for an injury to property, or a personal injury, resulting from negligence.

New Jersey Statutes:

> § 2A:14-1. Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining or converting personal property for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.
>
> § 2A:14-2. Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

Statement of Facts

Petitioner, a longshoreman, was injured on October 16, 1951, while working aboard respondent's vessel, the S.S. PRESIDENT HARRISON, docked at Pier 9, Jersey City, New Jersey.

An action was commenced in the United States District Court for the Southern District of New York on the law side of the Court on November 5, 1956. Jurisdiction was predicated upon diversity of citizenship between the petitioner, a New Jersey resident, and the respondent, a Delaware corporation, with offices at 29 Broadway, New York, New York

On motion to dismiss the action as barred by the applicable Statute of Limitations, the Court, granting the motion, held § 13 of the New York Civil Practice Act applicable, and employing the New Jersey two-year Statute of Limitations, § 2A:14-2, as a yardstick, ruled that petitioner failed to excuse his delay in bringing the suit some five years after the occurrence of the accident. Judgment was entered on March 30, 1957.

On appeal, argued March 5, 1958, and decided September 30, 1958, the United States Court of Appeals for the Second Circuit affirmed the ruling of the District Court holding that the Admiralty doctrine of laches was the sole applicable defense, that § 13 of the New York Civil Practice Act was relevant and § 2A:14-2 the New Jersey two-year Statute of Limitation by its language governed in the matter. The Court further declared that a presumption of prejudice by inexcusable delay in filing suit existed with the running of the Statute, which presumption the petitioner failed to overcome.

Reasons for Granting the Writ

The ruling of the Court below in holding that § 13, of the New York Civil Practice Act was applicable was in conflict with the decision of this Court in *Levinson* v. *Deupree*, 345 U. S. 648, a libel by an administrator for death of a passenger in Kentucky, under the Wrongful Death Statute of that state.

The administrator was incorrectly appointed in a county where there was lack of an estate. After the running of the one-year Statute of Limitations under the death statute, the administrator was properly appointed in the correct county. The question involved was whether the failure of proper appointment within the one year period barred the suit, which arose out of a maritime tort. The Supreme Court held:

> "• • • • But the narrow question here is whether such a forum, accepting and enforcing the limited scope given to the right by the local law which created it, must also be bound by the dubious and perhaps conflicting intimations on *elegantia juris* to be found in local decisions, whether, that is, a federal court is imprisoned by procedural niceties relating to amendments of pleadings" (p. 651).

• • •

"In the absence of congressional action, the court adopted and enforced the *obligatio* created by Kentucky as it would one originating in any foreign jurisdiction. *La Bourgogne*, 210 U. S. 98, 138; *The Hamilton*, 207 U. S. 398, 405. And it was bound to enforce it as it found it, but not bound beyond that to strive for uniformity of results in procedural niceties with the courts of the jurisdiction which originated the *obligatio*. Even in diversity cases, when 'a right is enforceable in a federal as well as in a State court,' and the federal court sits as 'another court of the State,' we have recognized that 'the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic.' *Guaranty Trust Co.* v. *York*, supra, 326 U. S. at 108. Whether, if this were a diversity case, we would consider that we are here dealing with 'forms and modes' or with matters more seriously affecting the enforcement of the right, it is clear that we are not dealing with an integral part of the right created by Kentucky" (pp. 651-652).

The Admiralty and Maritime jurisdiction is conferred upon the Federal power by the Constitution and is superior to the law of the several states, taking from the lesser politic body "all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations." *Knickerbocker* v. *Stewart*, 253 U. S. 149; *Lottawanna*, 88 U. S. 558; *Workman* v. *New York*, 179 U. S. 552; *Benedict on Admiralty*, Vol. I, §§ 1, 10.

The Admiralty jurisdiction being superior as one of a special class of powers conferred by the Constitution, this Court has repeatedly declared its paramount status, further holding that while state law may at times supplement or modify the general maritime law, it cannot contravene the

essential purpose of, work material prejudice to, or interfere with its characteristics or the harmony and uniformity of said law in its international and interstate relationships. *Just* v. *Chambers*, 312 U. S. 383; *The Roanoke*, 189 U. S. 185; *Washington* v. *Dawson*, 264 U. S. 219; *Spencer* v. *Hicks*, 285 U. S. 502; *Union* v. *Erickson*, 248 U. S. 308; *DiSanto* v. *Pennsylvania*, 273 U. S. 34. See also: *Jansson* v. *Swedish*, 185 F. 2d 212; *Rogers* v. *City*, 285 F. 362; *Kuhn* v. *City*, 274 N. Y. 118; *Riley* v. *Agwilines*, 296 N. Y. 402; *McFall* v. *Belge*, 304 N. Y. 314.

This Court, in *Robins* v. *Dahl*, 266 U. S. 449, asserted that claims affecting maritime workers and the scope of their rights and liabilities were within the Maritime jurisdiction and were not of local concern. See also: *Gonsalves* v. *Morse*, 266 U. S. 271; *Baizley* v. *Span*, 281 U. S. 222; *Jefferson*, 215 U. S. 130.

Pope & Talbot v. *Hawn*, 346 U. S. 406, determined that rights arising out of a maritime tort were governed by doctrinal general maritime law, whether the cause of action was grounded upon the Admiralty jurisdiction or upon diversity of citizenship on the law side of the Court.

> "(a) The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires. Petitioner presents no persuasive arguments that admiralty should now adopt a discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight.
>
> (b) Nor can we agree that Hawn's rights must be determined by the law of Pennsylvania, under which, it is said, any contributory negligence would bar all recovery in this personal injury action. True,

> Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, 'a type of action which the Constitution has placed under national power to control in "its substantive as well as its procedural features. * * *"' *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 386. And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to *enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometime supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court.* These principles have been frequently declared and we adhere to them. See e.g., *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 243-246, and cases there cited." (pp. 408-410) (italics ours).

As such, the *Hawn* case, as the case at bar, was within the Admiralty and Maritime jurisdiction, bound only by that superior class of powers as expressed in the Constitution of the United States, Article III, § 2, and not limited or qualified by the attempts of state legislatures to control the state judicial forms and modes.

See also:

Garrett v. *Moore-McCormack*, 317 U. S. 239.

§ 13 of the New York Civil Practice Act expressly limited its applicability to actions "brought in a court of this state".

The Court below correctly affirmed the maritime doctrine of laches as the sole defense available to time

bar a suit within the Admiralty jurisdiction,[2] then incorrectly applied § 13, a New York statute enactely solely as a procedural bar in actions within State jurisdictional bounds, and without the Admiralty jurisdiction. In so doing, the Court restricted a maritime cause of action, to the very same limitation period that the suit would have had, had it been a suit at law, dictated by the law of the state, although the Court conceded that an Admiralty cause was unlike a suit at law, the reverse of the situation in *Guaranty* v. *York*, 326 U. S. 99. Thus the Court paid lip service to the Federal power and then destroyed this cause by its employment of a state procedural statute, expressly applicable only in a state court.

See also:

Finley v. *United States*, 244 F. 2d 125;
Szalkiewicz v. *Farrell*, 142 F. Supp. 496;
The Vema, 27 F. Supp. 679;
Westfall v. *Allmann*, 73 F. 2d 200.

As such, the Court below erroneously surrendered the paramount Admiralty class of powers to a state procedural form in conflict with the express declaration of this Court in *Levinson* v. *Deupree, supra.*

§ 13 of the New York Civil Practice Act being inapplicable in this matter, the New York six-year Statute of Limitations, § 48(3) of the New York Civil Practice Act, was the sole statutory guide to the Admiralty Court in determining the issue of the defense of laches herein. Holding otherwise, the Court below committed error.

Petitioner respectfully prays that this issue of supremacy of the Federal power of Admiralty jurisdiction be considered at this time.

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[2] The analogous Statute of Limitations of the forum, *LeGate* v. *Panamolga*, 221 F. 2d 689, has been held to be six years for claims arising out of the unseaworthiness of a vessel.

2. This Court has recently heard argument in *Skovgaard* v. *M/V Tungus*, 252 F. 2d 14 (3rd Circuit) and *Halecki* v. *United*, 251 F. 2d 708, (2nd Circuit) in which the interpretation of the scope of language "wrongful act, neglect or default"[3] was held to include an action predicated upon the doctrine of seaworthiness. The decision of the Court below in the case at bar was in part grounded upon the *Skovgaard* and *Halecki* decisions. Said decisions were in conflict with the Fifth Circuit in *Graham* v. *A. Lusi*, 206 F. 2d 223 and possibly with the Sixth Circuit in *Lee* v. *Pure*, 218 F. 2d 711. As such, the very conflicts present in said cases, and as yet unanswered by this Court, are involved herein.

The matter is of utmost importance since if this Honorable Court rules that the language in question does not encompass a cause of action predicated upon the doctrine of seaworthiness, its absence would then make the six year Statute of Limitation, New Jersey Statutes: § 2A:14-1, applicable rather than the two year § 2A:14-2, if indeed any New Jersey statute is at all involved herein.[4]

Petitioner respectfully prays that this Honorable Court will grant this petition in order to fully determine this apparently growing conflict between the various United States Courts of Appeals, concerning the scope of state Statutes of Limitations involving actions arising under the Federal power.

3. The decision by the Court below is the latest determination conflicting with the several declarations by this Honorable Court in the *Key City*, 81 U. S. 653; *Holmberg* v. *Armbrecht*, 327 U. S. 392; *Gardner* v. *Panama*, 342 U. S. 29 and *Czaplicki* v. *Hoegh Silvercloud*, 351 U. S. 525.

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[3] The language of the New Jersey two-year Statute of Limitations, as set out in § 2A:14-2, which section was held applicable by the Court below as the yardstick of the doctrine of laches.

[4] Only if § 13 of the New York Civil Practice Act is held applicable does the question of the New Jersey statute arise. Petitioner's position is, of course, that no New Jersey statute is relevant.

The doctrine of laches has been traditionally viewed and directed to the equities between the parties, which "varies with the peculiar circumstances of each case", "not subject to an arbitrary rule" of a state Statute of Limitations, *Halstead* v. *Grinnan*, 152 U. S. 412, to assist and not to defeat justice, *Spiller* v. *St. Louis*, 14 F. 2d 284.

The decision of the Court below again focused upon a policy of several United States Courts of Appeals concerning the burden of proof between the injured plaintiff and a defendant shipowner regarding the defense of laches.

That defense, to be affirmatively pleaded by the defendant in any case, has now been transformed by the Second, Third and Fifth Circuits into a theory of law which now presumes prejudice to a defendant with the mere passage of time of a state Statute of Limitations, notwithstanding the fact that the injured plaintiff can almost never overcome the onerous burden of said presumption.

Thus—the defendant, by raising the defense can destroy the cause without proof of prejudice by simply pleading the mere running of a state statute. The doctrine of laches, in effect, has thus been emasculated by the efforts of the judiciary to clear Court calendars of cases by the most outrageous of all methods—trial by affidavit.[5]

The rise of the presumption, nowhere to be found in Admiralty law until recently, has been rejected by this Court. The several Circuits abovementioned, while paying lip service to determinations of this Court, have presented an almost insurmountable barrier to the numerous plaintiffs who have attempted, without success, to overcome the presumption of prejudice.

The doctrine was first set out by the United States Circuit Court for the Fifth Circuit in *McGrath* v. *Panama*, 298 F. 303, as follows:

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[5] And this in cases where the injured plaintiffs are supposedly the "wards of the Admiralty."

"Courts of admiralty are not, however, bound by common-law limitations, but adopt them by analogy, unless equitable reasons exist for not doing so. In the case of a libel in personam for the recovery of damages for personal injuries, the reason for following the limitations of the common law in courts of admiralty is emphasized by reason of there being preserved to the libelant in such a case the right to sue at common law, as well as in admiralty. In the event the libelant sued at common law, the statute of limitations would bar a recovery. It would be inconsistent to permit him to sue in admiralty, with the same effect as at common law (as is true in the case of a libel in personam), after his right to sue at common law had become barred.

The appellant suggests that no injury is shown to have been done to the appellee by the delay in filing the libel. Injury is presumed from the statutory period of limitation in common-law actions, and, when equity adopts the statutory period, it adopts along with it the presumption of injury, while the contrary is shown" (p. 304).

As can be seen, no supporting case was cited by the Court. The error was heightened by the Court's appalling suggestion that a suit within the Admiralty jurisdiction was nothing more than a counterpart of an action at common law.

Marshall v. *International*, 39 F. 2d 551, a Second Circuit decision, predicated its ruling upon the *McGrath* case in upholding the existence of the presumption.

Redman v. *United States*, 176 F. 2d 713, the leading case in the Second Circuit and the basis for all subsequent decisions of that Court predicated its holding of presumptive prejudice upon the *Marshall* and *McGrath* cases.

Kane v. *Union*, 189 F. 2d 303, by the Third Circuit, grounded its ruling of the existence of the presumption upon the *Redman* case.

Thus—three Circuits have now based their policy with regard to the presumption of prejudice from the mere pas-

sage of the Statute of Limitations upon the *McGrath* case, which set forth no supportive law and which, as will be discussed, has been repudiated by this Court.

In *Gardner* v. *Panama*, 342 U. S. 29, *supra*, on appeal from the Fifth Circuit, 185 F. 2d 730, the Court of Appeals similarly based its ruling upon the *McGrath* case, thus further affirming that Court's position with regard to the doctrine. This Court, in reversing that decision, held as follows:

> "Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well. *Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere pasage of time, there should be no bar to relief.* The Key City, 14 Wall. 653 (1872); Southern Pacific Co. v. Bogert, 250 U. S. 483 (1919); Holmberg v. Armbrecht, 327 U. S. 392 (1946); see McGrath v. Panama R. Co., 298 Fed. 303, 304 (1924)." (pp. 30-31; italics ours.)

Thus—this Court affirmed its previous rulings with regard to the defense of laches as one addressed to the equities of the situation rather than a reference to, and mechanical application of, a state Statute of Limitation. Further, the Court again stated that the mere passage of time was no bar to relief. No reference was made to the question of the presumption of prejudice—nor should it have been necessary since the Court's language was seemingly clear and unequivocal.

Unfortunately the continued rigorous employment of the rule by the three Circuits has uniformly caused the destruction of the rights of numerous injured workmen in the maritime industries since that time, though this Court, repudiated the *McGrath* doctrine—the foundation case for the rulings of the three Circuits involved.

It would appear that said Circuits will accept nothing less than an express declaration by this Court that there is no presumption of prejudice from the mere running of a state Statute of Limitations, that if a defendant wishes to plead the affirmative defense, it must show prejudice to its position rather than place the onerous burden upon the plaintiff who almost always has no knowledge of what facts would prejudice his opponent and can never adequately *present sufficient proof by affidavit.*[6]

This Court, in *Czaplicki* v. *Hoegh Silvercloud, supra,* effectively repudiated the policy of trial by affidavit in a matter strikingly similar to the case at bar, except that the action therein was commenced after the six year limitation period of the forum had also passed. In remanding the case to the District Court for a determination of the issue of laches, this Court stated:

> "4. The Court of Appeals found it unnecessary to consider whether Czaplicki could maintain this suit, because it was held barred in any event on account of laches. The only reason given for this holding was that both the New York and New Jersey statutes of limitations, the two that might be applicable, had run. It is well settled, however, that laches as a defense to an admiralty suit is not to be measured by strict application of statutes of limitations; instead, the rule is that 'the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case.' *The Key City,* 14 Wall. 653, 660. In cases where suit has been brought after some lapse of time, the question is whether it would be inequitable, because of the delay, to enforce the claim. *Holmberg* v. *Armbrecht,* 327 U. S. 392, 396; *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 488-489. '*Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief.*'

[6] The District Court in the case at bar stated that the defendant failed to prove prejudice to its position, yet dismissed the complaint.

Gardner v. *Panama R. Co.*, 342 U. S. 29, 31. *This does not mean, of course, that the state statutes of limitations are immaterial in determining whether laches is a bar, but it does mean that they are not conclusive, and that the determination should not be made without first considering all the circumstances bearing on the issue.*

In this case, the District Court never passed on the defense of laches, which although properly put in issue was made irrelevant by the holding that, because of the statutory assignment of his right of action, Czaplicki could not maintain this action. Not only was there no decision on laches, but there was never an opportunity for Czaplicki to introduce evidence to justify the delay, since the suit was dismissed after preliminary hearings and argument on the issue of Czaplicki's 'standing.'

When the case reached the Court of Appeals, therefore, the record was incomplete on the issue of laches. There is nothing in the record to show that Czaplicki was given any more opportunity in the Court of Appeals to explain the delay than he had been given in the District Court. *The only 'finding' made by the Court of Appeals was that the running of the statutes of limitations constituted laches, and that, as we have stated, was insufficient.* From all that appears, Czaplicki may have failed to bring suit earlier because he relied on the assignee of the right of action to enforce what was presumably an interest common to both of them. The record does not disclose when Czaplicki discovered the assignee's conflicting interest, or whether there has been unjustifiable delay since that discovery. Nor has there been opportunity to prove the statement made in an affidavit to the District Court, that the delay has in no way prejudiced the respondents. These are questions on which the parties should have been allowed to present evidence. The present record is inadequate to justify a holding that this action was barred by laches.

Since 'the existence of laches is a question primarily addressed to the discretion of the trial court,' *Gardner* v. *Panama R. Co.*, *supra*, at p. 30, we remand the case to the District Court for further pro-

ceedings not inconsistent with this opinion" (pp. 533-534).

It appears almost incredible that a doctrine so thoroughly and completely rejected by this Court should still have some effect as the prevailing law by the several Circuits. Still more incredible is the fact that the doctrine has actually been expanded since the *Gardner* decision.

Petitioner respectfully requests that this Court should now terminate what is fast becoming a nationwide practice as an incorrect expression of the equitable doctrine of laches in order to assist and not defeat justice between parties in an action arising out of a maritime tort and within the Admiralty and Maritime jurisdiction and most respectfully places this urgent matter before this Honorable Court for consideration.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petitioner.

Dated: December 19, 1958.

Respectfully submitted,

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APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 208—October Term, 1957.

(Argued March 5, 1958 Decided September 30, 1958.)

Docket No. 24662

ANDREW OROZ,

Plaintiff-Appellant,

v.

AMERICAN PRESIDENT LINES, INC.,

Defendant-Appellee.

Before:

LUMBARD, WATERMAN and MOORE,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Lawrence E. Walsh, *Judge*, dismissing plaintiff's action on the ground that it was not timely commenced. Affirmed.

MARTIN G. STEIN, New York, N. Y. (Jacob Levine and Alvin I. Apfelberg, New York, N. Y. on the brief), for plaintiff-appellant.

FREDERICK FISH, New York, N. Y. (Robert J. Nicol, New York, N. Y. and Symmers, Fish, Warner & Nicol, New York, N. Y. on the brief), for defendant-appellee.

LUMBARD, *Circuit Judge*:

Plaintiff, a longshoreman, appeals from a judgment by Judge Walsh, Southern District of New York, dismissing his civil action which was commenced five years after the alleged negligence and unseaworthiness on the ground that it was barred by a two year New Jersey statute of limitations or, in the alternative, by laches. The questions for decision are whether a statute of limitations or laches is the proper limitation to a maritime tort action brought on the civil side of a federal court; and, if the admiralty doctrine of laches applies, whether the lower court properly exercised its discretion in holding that the plaintiff was barred by laches from litigating his claim. We hold that the admiralty doctrine of laches applies even though the suit is an action "at law" on the civil side of the court, and that an inexcusable delay of five years bars this action.

The complaint alleges that plaintiff, a longshoreman, was injured on October 16, 1951 while working aboard defendant's vessel the S. S. President Harrison when she was docked at a pier in Jersey City, New Jersey, and that the injuries were due to defendant's negligence and the unseaworthiness of its vessel. The action was commenced on November 15, 1956, over five years after the injury occurred. The lower court dismissed a claim grounded on the Jones Act, 46 U. S. C. A. § 688, because of the express three-year limitation governing that Act, 45 U. S. C. A. § 56, and plaintiff does not dispute this ruling.[1] Plaintiff also claims liability for negligence arising out of general maritime law. Since that claim, even though asserted beyond the limitation period, may be joined with an unseaworthiness claim timely commenced, *LeGate v. The Panamolga*, 221 F. 2d

[1] The Jones Act claim is defective in another respect as well, since plaintiff, being a longshoreman, is not a seaman within the meaning of that Act. See Gilmore and Black, Admiralty, 282-283 (1957). See footnote 3.

689 (2 Cir. 1955), we consider only whether there is any bar to the unseaworthiness claim.[2]

With respect to the unseaworthiness claim, "rooted in federal maritime law," *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 409 (1953), there is no federal statute of limitations, and if this action had been brought in admiralty it is conceded that the proper limitation would have been laches. Here, however, the suit is on the civil side of the federal court under the savings clause, 28 U. S. C. A. § 1333, which permits vindication of maritime rights through other remedies. If a federal court were mechanically to apply a local limitation statute in the instant case, it would be because "in 'law' actions where a federally created right is being enforced, the federal courts will apply the applicable state statute of limitations in the absence of a controlling federal statute of limitations." 2 Moore, Federal Practice 717 (2d Ed. 1948).

Defendant contends that this general doctrine of borrowing the state statute should prevail because the bar of the state statute is merely a procedural incident of the form of action which plaintiff pursues. But it is well settled that claims such as this are controlled in substantive respects by maritime law fashioned in the federal courts and the choice of an action "at law" cannot serve to diminish the dimensions of the substantive rights accorded by that law. Admiralty principles govern the civil action and override common law rules such as those concerning contributory negligence, burden of proof, and assumption of the risk even though these rules are often characterized as "procedural" or "remedial." See *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239 (1942); *Pope & Talbot, Inc.* v. *Hawn, supra.*

Sound judicial administration of maritime claims requires uniformity with respect to the measure of limitations

[2] In view of our decision that the unseaworthiness claim, even though governed by laches, is barred, there is no reason to discuss whether the negligence claim is also subject to laches rather than a statutory limitation.

as well as with respect to such matters as contributory negligence and burden of proof. Just as "(t)he operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law," *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 112 (1945), so is the application of different time bars on different sides of the federal court at variance with the sound administration of maritime law. "Of course the substantial rights of an injured person are not to be determined differently whether his case is labelled 'law side' or 'admiralty side' on a district court's docket." *Pope & Talbot, Inc.* v. *Hawn, supra*, at 411. Cf. *Rose* v. *United States*, 73 F. Supp. 759 (E. D. N. Y. 1947). We have here in most respects the reverse of the situation in *Guaranty Trust Co.* v. *York, supra.* There a federal court adjudicating rights arising out of state law applied a state limitation statute even though the federal remedy was equitable in nature. Here a court is asked to provide a remedy "at law" by virtue of the savings clause to vindicate rights arising out of maritime law and governed by admiralty principles. The considerations which require the application of a state limitation statute in an action arising out of and governed by state law also compel the application of the admiralty limitation in an action arising out of federal maritime law and governed by admiralty principles.

For these reasons we are of the opinion that the proper measure of the time within which suit must be commenced is the admiralty doctrine of laches, not a local statute of limitations. *Henderson* v. *Cargill, Inc.*, 128 F. Supp. 119 (E. D. Pa. 1954); *Apica* v. *Pennsylvania Warehousing & Safe Deposit Co.*, 74 F. Supp. 819 (E. D. Pa. 1947), 101 F. Supp. 575 (E. D. Pa. 1951).

Although laches is the proper measure of limitation, it has long been settled doctrine that, in deciding whether maritime claims are barred by laches, courts of admiralty will use local limitation statutes as a rule-of-thumb as to the presence or absence of prejudice and inexcusable delay. If the statute has run, prejudice by reason of inexcusable delay is presumed in the absence of a showing to the con-

trary; if it has not run, the converse is inferred. *Redman* v. *United States*, 176 F. 2d 713 (2 Cir. 1949); *Kane* v. *U. S. S. R.*, 189 F. 2d 303 (3 Cir. 1951), cert. den. 342 U. S. 903; *Wilson* v. *Northwest Marine Iron Works*, 212 F. 2d 510 (9 Cir. 1954).

The injury occurred in New Jersey territorial waters, and it is conceded that, if any statute is relevant, § 13 of the New York Civil Practice Act, which bars suit in New York if barred in the state where the cause of action arose, alerts us to look to the limitation statutes of New Jersey.

Plaintiff urges that the warranty of seaworthiness should be treated as an implied contract and consequently that the applicable New Jersey statute is N. J. S. A. 2A:14-1, which permits six years for bringing a contractual claim, express or implied. We agree with the district court, however, that the six year statute does not apply, and that the governing statute is the New Jersey two-year provision, N. J. S. A. 2A:14-2.[3] Only recently we held that the same language, "wrongful act, neglect, or default," as used in the state's wrongful death act, N. J. S. A. 2A:31-1, encompassed an action based upon unseaworthiness. *Halecki* v. *United New York & New Jersey Sandy Hook Pilots Association*, 251 F. 2d 708 (2 Cir. 1958), cert. granted June 9, 1958. See also *Skovgaard* v. *The Tungus*, 252 F. 2d 14 (3 Cir. 1957), cert. granted June 9, 1958. Further, this Court has suggested that breach of the implied warranty of seaworthiness is a tort, *Strike* v. *Netherlands Ministry of Traffic*, 185 F. 2d 555, 558 (2 Cir. 1950), cert. den. 341 U. S. 904.

In any event, the construction of the New Jersey statutes by the New Jersey courts is determinative, and they have uniformly held that the two-year provision applies to all personal injury claims, whether based upon tort or con-

[3] 2A:14-2. Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

tract. *Burns* v. *Bethlehem Steel Co.*, 20 N. J. 37, 118 A. 2d 544 (1955); *Weinstein* v. *Blanchard*, 109 N. J. L. 332, 162 Atl. 601 (Err. & App. 1932). See *Martucci* v. *Koppers Co.*, 58 F. Supp. 707 (N. J. 1945).[4]

The question whether laches should bar the suit is addressed to the sound discretion of the trial court. *Czaplicki* v. *SS Hoegh Silvercolud*, 351 U. S. 525, 534 (1956). We see no abuse of discretion in the dismissal of an action brought more than five years after the accident and three years after the running of the analogous state statute. The affidavit of plaintiff's counsel, in opposition to the motion for judgment on the pleadings, gives no legally sufficient reason why the plaintiff failed to bring suit for five years. It merely pleads plaintiff's ignorance and states that Oroz was "unaware of any remedy that he may have against the shipowner." Ignorance is not a sufficient excuse to permit litigation of such a stale claim. *Morales* v. *Moore-McCormack Lines*, 208 F. 2d 218 (5 Cir. 1953). See also *McChristian* v. *Lykes Bros. S.S. Co.*, 94 F. Supp. 149 (S. D. Tex. 1950). Since ample opportunity was accorded plaintiff to justify his delay and no sufficient excuse has been asserted, there is no need for a hearing on the matter. Compare *Czaplicki* v. *SS Hoegh Silvercloud*, *supra*, at 534. There was no abuse of discretion in dismissing the complaint.

Affirmed.

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[4] In *McAllister* v. *Magnolia Petroleum Co.*, filed June 23, 1958, the Supreme Court held that when an unseaworthiness claim is joined with a Jones Act claim a local limitation statute cannot serve to bar the former claim if the limitation is less than three years. It was pointed out that seamen wishing to predicate recovery on these alternate grounds must bring both claims in the same proceeding. If the unseaworthiness claim is governed by a shorter limitation, the time within which a statutory claim may be brought is effectively diminished. Here, however, since plaintiff is not within the class covered by the Jones Act, we have no question whether the application of a shorter state limitation to plaintiff's claim will in any respect restrict federal rights accorded seamen by statute. We thus do not consider the Jones Act limitation pertinent to the disposition of this action.

MOORE, *Circuit Judge* (concurring in the result):

This is an action at law for personal injuries and came into the federal court system solely because diversity of citizenship was pleaded. There can be little doubt that a New York state court applying its borrowing statute, N. Y. C. P. A. section 13, would have held, as did Judge Walsh, that the New Jersey two year statute of limitations barred the claim. The plain teaching of *Guaranty Trust Co.* v. *York*, 326 U. S. 99, that a federal court sitting in a diversity action should apply the same statute of limitations as would a state court, is, in my opinion, disregarded by the majority because of a desire to establish uniformity.

The uniformity established, however, I believe would simply make a confused situation more confounded. As conceded by the majority, the state statute is, in any event, the touchstone; all that the injection of laches accomplishes is to create an additional element of uncertainty.

Moreover, there is no need for establishing this uncertainty. Laches is not an integral part of maritime law. The rationale of *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, in holding that contributory negligence was not a bar was the recognition of and deference to the universal application in admiralty of apportionment rules. Statutes of limitation, however, regulate many admiralty actions,[1] including ones for personal injuries.[2] Admiralty courts merely borrowed the devices of laches from equity and applied it to some personal injury actions for want of a better and more explicit limitation.

The majority cites no case where laches has been used to govern an action at law. This is not surprising because

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[1] *E. g.*, petitions for limitation of liability, 46 U. S. C. § 185; salvage suits, 46 U. S. C. § 730; claims under the Carriage of Goods by Sea Act, 46 U. S. C. § 1303(6).

[2] Death on the High Seas Act, 46 U. S. C. § 763; the Suits in Admiralty Acts, 46 U. S. C. §§ 745, 782; the Jones Act, 46 U. S. C. § 688.

such a doctrine, while easily administered by a court sitting as the trier of fact, in jury trial is apt to produce unjust, and in fact, non-uniform results. While the majority here obviates the jury trial requirement by, in effect, awarding summary judgment, the usual practice in this circuit [3] as well as in others [4] is to have a full hearing on the issue of laches even where the analogous statute of limitations has run.

The effect of the majority decision will be to congest further the already over-crowded personal injury jury calendars. I would apply the state statute of limitations.

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[3] *The Fulton*, 2 Cir., 1931, 54 F. 2d 467; see *Czaplicki* v. *S.S. Hoegh Silvercloud*, 351 U. S. 525, 533-34, reversing a finding by this court on the issue of laches since "there was never an opportunity for Czaplicki to introduce evidence to justify the delay."

[4] *McDaniel* v. *Gulf & South American Steamship Co.*, 5 Cir., 1955, 228 F. 2d 189; *Loverich* v. *Warner Co.*, 3 Cir., 1941, 118 F. 2d 690.

Memorandum Opinion by Walsh, *D. J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

WALSH, *D. J.*

Defendant moves to dismiss the complaint as time-barred. The motion is granted.

This is an action for personal injuries allegedly sustained by plaintiff while employed by Turner and Blanchard, Inc. as a longshoreman, aboard defendant's vessel alongside her pier in Jersey City, New Jersey. The injury occurred on October 16, 1951; the complaint was served and filed on November 5, 1956. Plaintiff is a resident of New Jersey.

The complaint alleges a claim under the Jones Act (46 U. S. C. A. § 688) and for negligence and unseaworthiness under the common law and the general maritime law. With respect to the Jones Act claim, the motion must be granted because the statute creating the cause of action expressly prescribes that it be brought within three years. 45 U. S. C. § 56. *Rogosich* v. *Union Dry Dock & Repair Co.*, 3 Cir., 67 F. 2d 377; *Streeter* v. *Great Lakes Transit Corp.*, W. D. N. Y., 49 F. Supp. 466; *Petition of Clinchfield Navigation Co.*, S. D. N. Y., 26 F. 2d 290.

With respect to the claims based upon the common law and the general maritime law, there is no federal statute of limitations, and this Court looks to the analogous statutes of the state of New York.

Section 13 of the New York Civil Practice Act provides that a suit by a non-resident is barred if either the New York statute of limitations or the statute of limitations of the state in which the cause of action accrued has run.

The analogous New York statute for a claim based upon unseaworthiness fixes a period of six years. *LeGate* v. *The Panamolga*; 2 Cir., 221 F. 2d 689. Although the New York statute for a claim based upon negligence fixes a period of three years, nevertheless if the time within which to bring an action based upon unseaworthiness has not expired, the related claim based upon negligence will not be dismissed in the absence of a showing of prejudice by the defendant. *LeGate* v. *The Panamolga*, *supra*. The six year period of the New York statute had not expired when the complaint was served and filed. There is no showing of prejudice by defendant.

The next question is whether the analogous New Jersey statute of limitations had run. That statute is N. J. S. 2A:14-2, and it reads as follows:

> "Every action at law [1] for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued."

The New Jersey courts have held this statute to be applicable to all claims for personal injury whether based upon tort or contract. In *Burns* v. *Bethlehem Steel Co.*, 20 N. J. 37, 118 A. 2d 544, a rigger employed in defendant's shipyard, sued for personal injuries claiming to be a third party beneficiary of a contract between his union and the

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[1] The expression "action at law" seems to have no significance in this particular case. There is no indication that it was intended to restrict this section to actions derived from the common law. Rule 4:2 of the Rules of the Supreme Court of New Jersey provides:

> "There shall be one form of action in civil practice to be known as a 'civil action'."

This succeeds a former provision of the Revised Statutes of 1937, § 2:27-7 which provided, in part, as follows:

> "There shall be one form of civil action in the courts of common law which shall be denominated an 'action at law'."

defendant, which he alleged was breached by failure to provide certain safety devices. The court held that the two year statute was applicable, rather than the six year statute provided for contract claims.[2] In so holding it followed *Weinstein* v. *Blanchard*, E. & A., 109 N. J. L. 332, 162 A. 601, a case in which a patient claimed for injuries caused by the malpractice of a physician alleging a breach of the contractual relationship with the physician. Although the *Weinstein* case was decided under an earlier statute which was different in form,[3] the *Burns* case held that the changes in the statute were merely as to form, not substance; that there was no evidence of a legislative intent to change the

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[2] The six year provision is contained in Section 2A:14-1:

"Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued."

[3] Prior to January 1, 1952 the applicable New Jersey statutes provided as follows:

Section 2:24-2:

"All actions for injuries to the person caused by the wrongful act, neglect or default of any person or persons, firm or firms, individual or individuals, corporation or corporations within this state shall be commenced within two years next after the cause of any such action shall have accrued, and not thereafter."

Section 2:24-1:

"All actions in the nature of trespass quare clausum fregit, trespass, detinue, trover, actions of replevin * * *, actions in the nature of debt * * *, actions of account, actions in the nature of actions upon the case, except the actions mentioned in section 2:24-2 and section 2:24-3 of this title, shall be commenced within six years next after the cause of any such action has accrued, and not thereafter. * * *"

rule of the *Weinstein* case. The *Weinstein* case was also followed in *Martucci* v. *Koppers Co.*, D. C. N. J., 58 F. Supp. 707.

It is, therefore, my conclusion that plaintiff's action would be barred in the New Jersey courts, and consequently that it would also be barred in New York State courts. Liability for unseaworthiness is not based upon fault, *The Osceola*, 189 U. S. 158; *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U. S. 85; the employer's breach of his obligation has been characterized as a tort which arises out of the maritime status or relation. *Strika* v. *Netherlands Ministry of Traffic*, 2 Cir., 185 F. 2d 555, 558. Its original derivation may be lost in the past. *LeGate* v. *The Panamolga, supra*. Yet there can be no question, regardless of the nature of the shipowner's obligation, that this is a claim for personal injury based upon its alleged wrongful failure to perform its obligation. Accordingly, in New Jersey the claim would be governed by the two year statute of limitations.

Plaintiff claims that although this action was brought on the law side of the court rather than the admiralty side the test is one of laches rather than the rigid application of the New Jersey statute. Assuming this is so, it would not avail the plaintiff here. No adequate excuse for his delay is shown in the complaint. In the papers in opposition to this motion it is said only that he was almost illiterate and unaware of his right to make this claim. This in itself is no excuse. Such ignorance is improbable and at any rate unjustified. Here plaintiff apparently recovered workmen's compensation benefits and was content with this recovery against his employer, without attempting any claim against the vessel or her owners. Longshoremen as a group have shown themselves well-informed of their right to pursue such claims and when such a claim is meritorious, the employer or his workmen's compensation insurance carrier will take appropriate action if the injured employee fails to do so. In the absence of a better excuse,

after five years defendant should not be required to defend an action upon the basis of the employer's compensation file, particularly when its interest may be adverse to that of the employer or its compensation carrer.

Motion granted. Complaint dismissed.

LAWRENCE E. WALSH
United States District Judge.

Dated: March 29, 1957.

Judgment entered
Herbert A. Charlson
Clerk

3/30/57

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of September, one thousand nine hundred and fifty-eight.

Present:

HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

S/ A. DANIEL FUSARO,
Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 601

ANDREW OROZ,

Petitioner,

v.

AMERICAN PRESIDENT LINES, LTD.,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM GARTH SUMMERS,
FREDERICK FISH,
Counsel for Respondent.
37 Wall Street,
New York 5, New York.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

ANDREW OROZ,
Petitioner,
v.
AMERICAN PRESIDENT LINES, LTD.,
Respondent.

No. 601

BRIEF FOR THE RESPONDENT IN OPPOSITION

Question Presented

The real question presented is whether the Court of Appeals was correct in ruling that there was no abuse of discretion by the District Court in finding on the undisputed facts that there was inexcusable delay on the part of petitioner, prejudicial to respondent, in waiting more than five years before instituting any action and that he was barred by the doctrine of laches.

Statutes Involved

The pertinent provisions of the New York and New Jersey statutes are set forth in pages 3 and 4 of the petition.

In addition, there is reference to the Jones Act, 41 Stat. 1007, 46 U. S. C. 688, in the 12th article of the complaint (R. 4).* Petitioner, however, was a longshoreman, not a

*Numerals following the letter "R" in parenthesis refer to pages in plaintiff-appellant's appendix in the Court of Appeals which has been filed here.

seaman, not one of those who go to sea in ships and who are the true wards of the admiralty. Both Courts below correctly ruled that the Jones Act does not apply to longshoremen, non-employees of the shipowner, and that, in any event, petitioner would be barred by the express 3 year limitation period of that Act.

No contention is now made that either the Jones Act, 41 Stat. 1007, 46 U. S. C. 688 or the Federal Employer's Liability Act, 35 Stat. 65, 45 U. S. C. 51, is applicable to this case.

Statement

Action was brought by petitioner to recover for personal injuries sustained more than five years prior to the date of the summons in an accident on board one of respondent's ships while petitioner was employed as a longshoreman by an independent stevedoring company.

The complaint (R. 2-5) claims negligence of respondent and unseaworthiness of its vessel. Jurisdiction is based upon diversity of citizenship.

The third separate defense pleaded by respondent (R. 7) reads as follows:

> "NINTH: Alleged right of action set forth in the complaint against defendant did not accrue within the period limited by the applicable statutes of the States of New Jersey and New York."

Respondent's motion to dismiss (R. 8), on which judgment was granted, was based on the pleadings and on the defense that action was not timely brought. Respondent's affidavit in support of its motion recited no facts not established by the pleadings. The primary purpose of the affidavit was to set forth for the Court the pertinent provisions of the applicable statutes of limitation (R. 10-12).

Petitioner thereupon filed an opposing affidavit (R. 13-16) setting forth in full the alleged factual background that petitioner urged in justification of the years of delay in instituting suit. This merely alleged petitioner's ignorance and stated that he had been unaware of any remedy that he might have had against the shipowner. Respondent has not, for purposes of the instant proceedings, controverted the alleged facts stated in this affidavit. At no time has it been suggested to the Court, either at hearing before the District Court, by subsequent motion or before the Court of Appeals, that petitioner himself be heard in person in substantiation of the affidavit. Counsel for petitioner made no contention then or later that the affidavit in any way was insufficient as an exposition or proof of petitioner's position. He did not seek then, nor has he sought at any time since, the right to amend the complaint or to submit further proof.

There being no genuine issue as to any material fact, Rule 56(c) F. R. C. P., the matter was thereupon heard on the foregoing documents. The District Court looked to the analogous statutes of New York and New Jersey, there being no federal statute of limitations, and ruled that the two year limitation statute of New Jersey would have been applied by a State Court. Then, after giving full consideration to petitioner's contention that petitioner was not guilty of laches, the Court found that the delay of more than five years was inexcusable, that prejudice to respondent in the circumstances of this case was inevitable, and dismissed the complaint.

On appeal, a majority of the Court of Appeals ruled that the doctrine of laches was applicable and that there had been no abuse of discretion by the District Court in the application of the doctrine. Circuit Judge Moore concurred in the result on the ground that he would apply the State statute of limitations.

Argument

The ruling of the Court of Appeals that there had been no abuse of discretion in the dismissal of the complaint, after careful consideration of all the undisputed facts, is clearly correct. No substantial questions, essential to the disposition of the litigation, and no conflict of decisions, are presented.

POINT I

THE ISSUE BEFORE THE DISTRICT COURT OF WHETHER A STATE COURT MAY APPLY ITS OWN STATUTE OF LIMITATIONS IN AN ACTION ARISING OUT OF A MARITIME TORT, FOR WHICH THERE IS NO FEDERAL STATUTORY LIMITATION, OR APPLY THE ADMIRALTY DOCTRINE OF LACHES, IS MOOT.

This is the issue which was specifically left open in *McAllister* v. *Magnolia Petroleum Co.* (1958), 357 U. S. 221, and in which reference was made to the decision of the District Court in the present case. Inasmuch as this action was filed more than three years after the expiration of the period of the applicable state statute of limitations, and as there has been no abuse of discretion in the application of the doctrine of laches, resolution of the broad issue of whether the doctrine of laches is applicable at all is no longer essential to the disposition of the present litigation.

POINT II

THE DECISION OF THE COURT OF APPEALS INVOLVES NO CONFLICT WITH THE DECISIONS OF ANY OTHER COURT.

There has been no mechanical application of any statute of limitations. The Courts below rather have recognized the substantive rights created by the admiralty but have

rejected the procedural niceties which literal application of the several State statutes would involve. In so doing their decisions have followed rather than rejected the basic principles enunciated in *Levinson* v. *Deupree* (1953), 345 U. S. 648 and *Garrett* v. *Moore-McCormack Co.* (1942), 317 U. S. 239.

There is, furthermore, no conflict with any case concerned with the interpretation of either the New York or New Jersey statutes. None has been suggested, for the New York statutes, and all the cases relating to New Jersey statutes are in accord with the unanimous view (on this point) of the Court of Appeals in the present case. *Skovgaard* v. *M/V Tungus* (3 Cir. 1957), 252 F. 2d 14, certiorari granted June 9, 1958, and *Halecki* v. *United New York & New Jersey Sandy Hook Pilots Association* (2 Cir. 1958), 251 F. 2d 708 certiorari granted June 9, 1958, are concerned with numerouus issues not involved in the present case. They also raise the question of interpretation of a different statute. In *Skovgaard* and *Tungus* there was an issue whether absolute liability in circumstances not recognized by New Jersey law at the time its death statute was passed, but recognized subsequently by decisions of this Court extending admiralty doctrines of unseaworthiness into new areas, was to be deemed as encompassed by the New Jersey death act. On this point there was no authoritative interpretation by the New Jersey State Courts.

The New Jersey statute presently under consideration relates to limitation of actions, a matter of procedure rather than of the creation of substantive rights. It has been clearly established by the Courts of New Jersey that N. J. S. A. 2A: 14-2, the two year limitation provision, applies to *all* personal injury claims, whether based upon tort or contract. *Burns* v. *Bethlehem Steel Co.* (1955), 20 N. J. 37, 118 A. 2d 544; *Weinstein* v. *Blanchard* (Err. & App. 1932), 109 N. J. L. 332, 162 Atl. 601. See *Martucci*

v. Koppers Co. (N. J. 1945), 58 F. Supp. 707. This construction of the New Jersey statutes by the New Jersey Courts is determinative.

POINT III

THE COURTS BELOW CORRECTLY APPLIED WELL ESTABLISHED PRINCIPLES OF BOTH THE ADMIRALTY AND COMMON LAW.

The District Court did not dismiss the complaint merely because of the passage of the time specified in the statute. Petitioner was given every opportunity to introduce evidence and decision was made only after careful consideration of all the undisputed proof presented by petitioner. The Court then found on all the evidence that the delay was inexcusable and that prejudice to respondent would result in having to try the case on the basis of the third-party stevedore's compensation files and on the testimony of the probably hostile employees of that third-party [e.g. *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.* (1958), 355 U. S. 563].

This is a far different situation from that presented in *Gardner v. Panama Railroad Co.* (1951), 342 U. S. 29, where final suit was brought only five days after timely prior proceedings had been dismissed because of Congressional action.

The present proceedings are also quite different from those in *Czaplicki v. SS Hocgh Silvercloud* (1956), 351 U. S. 525, where a finding of laches was made initially by the Court of Appeals on the basis of controverted facts which had not been considered by the District Court and where it was virtually conceded before this Court that if the issue of laches was determinative, the case should be remanded for consideration of that issue by the District Court.

In *Czaplicki*, this Court said at page 533, after considering *Gardner*:

> "This does not mean, of course, that the state statutes of limitations are immaterial in determining whether laches is a bar, but it does mean that they are not conclusive, and that the determination should not be made without first considering all the circumstances bearing on the issue."

Petitioner's argument is that for all practical purposes the state statute is to be disregarded entirely. Such position is untenable.

In this case ample opportunity was accorded to petitioner to justify his delay. See *Dixon* v. *American Telephone & Telegraph Co.* (2 Cir., 1947), 159 F. 2d 863.

There has been no error as to procedure or abuse in the exercise of discretion.

CONCLUSION

It is respectfully submitted that Petition for Writ of Certiorari should be denied.

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